

OGC Has Reviewed

4/9/51

To Members of the Technical Publishers Group

From

Subject: Revised Memorandum to the Department of Defense Task Force on
Publishing and Distribution of Training and Educational Literature

The following passages from Howell: The Copyright Law describe the legal aspects of copyright infringement by the Government and the course of action which is open to the copyright proprietor:

"Under the Tucker Act of 1887 (now embodied in the U.S. Code, Tit.28, sec.250), a suit for damages cannot be instituted in the Court of Claims against the Government in cases 'sounding in tort,' which would include an infringement of copyright. *Lanman v. United States*, 27 C. Cls. 260 (1892). But the immunity of the Government does not extend to its agents or employees. As remarked by the Supreme Court in a patent case, *Belknap v. Schild*, 161 U.S. 10 (1896): 'The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States . . . Such officers or agents, although acting under the order of the United States, are therefore personally liable to be sued for their own infringement of a patent.'

"In a recent copyright case, *Towle v. Ross*, 45 USPQ 143 (1940), the defendants acting as employees of the United States, and for the benefit of the Government, made photographic reproductions of an essential part of plaintiff's copyrighted map without his consent. Plaintiff got wind of this and objected, whereupon the work stopped and the reproductions were never used. Nevertheless plaintiff brought suit for infringement of copyright and damages against defendants individually. The court held that the making of these reproductions constituted infringement, whether

defendants acted in good faith and by mistake or by design, since each had actual notice of the existing copyright. The court awarded plaintiff the statutory minimum damages of \$250, but allowed no costs or attorney's fees. Said the court:

'The position of defendants as employees of the United States cannot protect them from the award of damages. The immunity of the sovereign cannot in a republic immunize its agents also. The acts were done for the benefit of the Government by the employees thereof. The foundations of arbitrary power would be firmly laid if the agents could violate the rights of citizens and themselves escape unscathed.'

"Section 40 (116) of the Copyright Act provides that in all actions and proceedings under the Act full costs shall be allowed, 'except when brought by or against the United States or any officer thereof.' In this connection the court, supra, remarked that the defendants came within the spirit of the exception even if they were not 'officers,' and that it would be contrary to the intention of Congress here to absolve the higher administrative heads and assess all the costs and attorney fees to the clerk who did their bidding."

"Infringement of a copyright is a 'tort,' giving rise to a civil suit for damages under section 25 (101) of the Copyright Act. If willful and for profit it is a misdemeanor punishable by fine or imprisonment, or both (section 28 (104)).

"The rule in relation to torts is that all persons participating therein, whether knowingly or not, are jointly and severally liable. Hence liability for infringement extends to the printer, publisher, and vendor of the copyright material. American Code Co. v. Bensinger, 282 F. 829 (CCA 2, 1922). But where such persons act severally in committing the

infringement, and not jointly or in concert, they cannot be sued jointly."

If any publisher has evidence beyond question of copyright infringement by the Government or any agency of the Government, it would seem to be of great advantage to the industry as a whole for suit to be brought against the responsible "officer or agent" of the Government by the injured publisher. Such an action would impress upon these members of the Government that they must respect the property rights of copyright proprietors.

II A. Regarding the availability of funds for purchase of copyrights, following is an extract from Chapter X, Title VII of Public Law 759 on appropriations for the support of the Government for the fiscal year ending June 30, 1951.

"Sec. 613. The appropriations contained in this chapter for the Air Force, Navy, and for the Army, which are available for the procurement or manufacture of supplies, materials, and equipment of special or technical design may be used for the development and procurement of gages, dies, jigs, and other special aids and appliances, production studies, factory plans, and other production data, including specifications and detailed drawings, and for the purchase of copyrights and letters patent, applications therefor, and licenses thereunder pertaining to such supplies, equipment, and materials for which the appropriations are made."

There is some question, however, regarding the application of this provision, and it is apparent that further legislation is needed.

B. In February, bills (S. 966 and H.R. 2821) "To enact certain provisions now included in the Defense Appropriation Act and the Civil Functions Appropriation Act, and other purposes" were introduced in the Senate and House of Representatives by Mr. Russell and Mr. Vinson respectively, and have been referred to the Committee on Armed Services in both houses.

Section 24(a) of these bills, applying to copyrights, is as follows:

"Sec. 24. (a) Appropriations for the military departments available for procurement or manufacture of supplies, equipment, and materials shall also be available for the purchase or other acquisition of (1) copyrights, letters patent and applications for letters patent; (2) licenses under copyrights, under letters patent and under applications for letters patent; (3) designs and design data. Any such purchase or other acquisition shall pertain to supplies, equipment, materials, or processes produced or used by or for, or useful to, the department concerned."

It is our understanding that these bills are remedial legislation designed to put in permanent form material already approved by Congress, and that there will be no opposition to their passage.

Nevertheless, in order to insure the passage of these bills, the members of the publishing industry should write to members of the Committees on Armed Services in both houses, stressing the importance of Section 24(a), and asking their support for its passage.

Following is the membership of the Committees on Armed Services:

Senate

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| Richard B. Russell, of Georgia | Styles Bridges, of New Hampshire |
| Harry Flood Byrd, of Virginia | Leverett Saltonstall, of Massachusetts |
| Virgil M. Chapman, of Kentucky | Wayne Morse, of Oregon |
| Lyndon B. Johnson, of Texas | William F. Knowland, of California |
| Estes Kefauver, of Tennessee | Harry P. Cain, of Washington |
| Lester C. Hunt, of Wyoming | Ralph E. Flanders, of Vermont |
| John C. Stennis, of Mississippi | |

J. Nelson Tribby, Chief Clerk

House of Representatives

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| Carl Vinson, of Georgia | Dewey Short, of Missouri |
| Overton Brooks, of Louisiana | Leslie C. Arends, of Illinois |
| Paul J. Kilday, of Texas | W. Sterling Cole, of New York |
| Carl T. Durham, of North Carolina | Paul W. Shafer, of Michigan |
| Lansdale G. Sasser, of Maryland | Charles H. Elston, of Ohio |
| James J. Heffernan, of New York | Jack Z. Anderson, of California |
| L. Mendel Rivers, of South Carolina | William W. Blackney, of Michigan |
| Philip J. Philbin, of Massachusetts | Leroy Johnson, of California |
| F. Edward Hébert, of Louisiana | Harry L. Towe, of New Jersey |
| Arthur Winstead, of Mississippi | Leon H. Gavin, of Pennsylvania |
| Franck R. Havenner, of California | Walter Norblad, of Oregon |
| Melvin Price, of Illinois | James E. Van Zandt, of Pennsylvania |
| O. C. Fisher, of Texas | James T. Patterson, of Connecticut |
| Porter Hardy, Jr., of Virginia | Paul Cunningham, of Iowa |
| William J. Green, Jr., of Penna. | William H. Bates, of Massachusetts |
| Clyde Doyle, of California | William E. Hess, of Ohio |
| Edward de Graffenried, of Alabama | Joseph R. Farrington, of Hawaii |
| L. Gary Clemente, of New York | |
| Victor Wickersham, of Oklahoma | |
| E. L. Bartlett, of Alaska | |
| A. Fernós-Isern, of Puerto Rico | |

Bryce N. Harlow, Clerk